(1)

91-1262

No. 91-_____

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DR. RICHARD BOWERS, GERALD WIREMAN, FREDERICK T. COUNTERMAN, DR. ERNEST COWLES, and KENNETH WATSON

Petitioners,

vs.

JAMES PERKO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. WEBSTER
Attorney General

BRUCE FARMER
Assistant Attorney General
Counsel of Record

JUNE STRIEGEL DOUGHTY
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

QUESTIONS PRESENTED

I.

WHETHER A DISTRICT COURT MAY DISMISS AN *IN FORMA PAUPERIS* PRISONER CIVIL RIGHTS ACTION AGAINST PRISON OFFICIALS UPON MOTION MADE PURSUANT TO THE FUGITIVE FROM JUSTICE RULE FOLLOWING THE PRISONER'S ESCAPE AND INVOLUNTARY RECAPTURE TWO DAYS LATER.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

A. The Applicability of the Fugitive from Justice Rule in Prisoner Civil Rights Cases is Novel, Has Significant Public Importance and is Best Addressed by this Court. 7

B. The Eighth Circuit's Rationale for Reversing the District Court and Refusing to Apply the Fugitive from Justice Rule in this Case has Serious and Detrimental Public Policy Ramifications 15

CONCLUSION 30

INDEX TO APPENDIX

Appendix A - Order of the Court of Appeals for the Eighth Circuit, October 31, 1991. . . . . A1

Appendix B - Order of the Court of Appeals for the Eighth Circuit, September 24, 1991. . . . . A3

Appendix C - Order of the District Court for the Western District of Missouri, June 14, 1990. . . . . A16

Appendix D - Report and Recommendation of United States Magistrate William A. Knox, May 2, 1990 . . . . . A18

TABLE OF AUTHORITIES

Cases:

Ali v. Sims, 788 F.2d 954 (3rd Cir. 1986) 11, 27

Beckett v. Cuyler, 523 F.Supp. 104 (E.D. Pa. 1981) 12, 27

Clark v. James, 794 F.2d 595 (11th Cir. 1986). 10, 27

Estelle v. Dorrough, 420 U.S. 534 (1975). 8, 20

Hussein v. Immigration and Naturalization Service, 817 F.2d 63 (9th Cir. 1986) 29

Joensen v. Waimwright, 615 F.2d 1077 (5th Cir. 1980). 10

Mason v. Indiana, 440 N.E.2d 457 (Ind. 1982) 9

Molinaro v. New Jersey, 396 U.S. 365 (1970). . . . . *passim*

State v. Schleeper, 806 S.W.2d 459 (Mo. App. 1991) 22

United States v. Halper, 490 U.S. 435 (1989). 18

United States v. London, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984). 9

United States v. $129,374 in U.S. Currency, 769 F.2d 583 (9th Cir. 1985) 10

United States v. One Parcel of Real Estate, 868 F.2d 1214 (11th Cir. 1989). 13

United States v. Puzzanghera, 820 F.2d 25 (1st Cir. 1987) 21

United States v. Real Estate Located at Incline Village, 755 F.Supp. 308 (D.Nev. 1990) 13, 26

United States v. Sharpe, 470 U.S. 675 (1985). 8

United States v. Snow, 748 F.2d 928 (4th Cir. 1984) 16

Statute:

28 U.S.C. § 1254(1). 2

28 U.S.C. § 1331 1

28 U.S.C. § 1343(3). 1

28 U.S. C. § 1343(4) 1

42 U.S.C. § 1983 2

Fed.R.Civ.P. 41(b) 3

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 945 F.2d 1038. The opinion is also included as Appendix B in the appendix attached to this petition. The opinion of the District Court is unreported but is included as Appendix C of the appendix. The Magistrate's Report and Recommendation is not published but is included as Appendix D of the appendix.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on September 24, 1991. The petition for rehearing or rehearing en banc was denied on October 31, 1991. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 1343(3) and (4). Petitioners, Bowers, Wireman, Counterman, Cowles and Watson, all of which are current

or former employees of the Missouri Department of Corrections, invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eighth Amendment which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals reversing the district court's dismissal of a Missouri inmate's 42 U.S.C. § 1983 action against prison officials and medical personnel of the

Missouri State Penitentiary in Jefferson City, Missouri. This litigation originally arose in 1987 when James Perko, then incarcerated at MSP, filed this civil rights claim against prison officials and medical personnel alleging defendants were deliberately indifferent to his serious medical needs with respect to tuberculosis. The district court granted Perko leave to proceed *in forma pauperis* on June 15, 1987. While the case was pending, Perko completed his prison sentence and was released from confinement in January of 1988.

Perko made no effort to pursue his lawsuit after his release. On June 13, 1988, the United States Magistrate to whom the case was referred for pre-trial matters ordered plaintiff to show cause why his lawsuit should not be dismissed pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute. Perko failed to respond to that order and on

August 4, 1988, the magistrate recommended that plaintiff's claims be dismissed for failure to prosecute and to comply with the orders of the court. Perko filed exceptions to the magistrate's report and recommendation stating he had been arrested on June 12, 1988, and had been unaware of the court's Order of June 13, 1988. Perko's arrest on June 12, 1988 was for armed robbery, a crime for which he was subsequently convicted and sentenced to fifteen years imprisonment in Missouri. The magistrate allowed plaintiff until January 2, 1989 to respond to the court's Order of June 13, 1988, and in May of 1989, the magistrate vacated his previous recommendation that the lawsuit be dismissed and appointed Perko an attorney to represent him in the case.

In August of 1989, Perko, through counsel, served written discovery on defendants. On September 5, 1989, before defendants had responded to Perko's

discovery, Perko escaped from Moberly Correctional Center in Moberly, Missouri where he was then incarcerated. Following his escape, a large man-hunt was initiated and Perko was apprehended and returned to custody on September 7, 1989. Perko was convicted and received an additional three-year sentence for this escape.

After Perko's escape and recapture, defendants responded to the discovery Perko's counsel had served on them prior to his escape. On January 4, 1990, defendants moved to dismiss Perko's lawsuit pursuant to the fugitive from justice rule. Perko, through counsel, opposed defendants' motion and the magistrate recommended that defendants' motion be denied "only because of the serious nature of the allegations in the complaint." Defendants filed exceptions to the magistrate's report, attaching relevant medical records for the district court's consideration in deciding whether the case

should proceed. The district court granted defendants' motion and dismissed Perko's case "[f]or the reasons set forth in defendants' motion and exceptions."

On September 24, 1991, the Eighth Circuit Court of Appeals reversed the district court's decision and remanded the case with directions to reinstate and promptly process the action. Defendants timely filed their petition for rehearing or rehearing en banc, which was denied by the Eighth Circuit on October 31, 1991.

REASONS FOR GRANTING THE WRIT

A. The Applicability of the Fugitive from Justice Rule in Prisoner Civil Rights Cases is Novel, Has Significant Public Importance and is Best Addressed by this Court.

This case presents the simple, yet novel, question of whether the fugitive from justice rule, also known as the disentitlement doctrine, is applicable to prisoner civil rights actions against prison officials where the plaintiff inmate escapes while the case is pending and is recaptured involuntarily and only as a result of a large manhunt. This Court most notably addressed the fugitive from justice rule in the case of ***Molinaro v. New Jersey*** in 1970 when the court dismissed the criminal appeal of a defendant who had been free on bail, but had failed to surrender himself to state authorities and, consequently, was considered a fugitive from justice. 396 U.S. 365 (1970)

(per curiam). In the context of that criminal appeal this Court stated:

> While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

Id. *See also*, *United States v. Sharpe*, 470 U.S. 675, 682 n. 2 (1985) ("dismissal . . . is based on the equitable principle that a fugitive from justice is 'disentitled' to call upon this Court for a review of his conviction").

Countless criminal appeals have been dismissed in the wake of the *Molinaro*, decision where the criminal defendant escapes authorities either prior to or during the pendency of the appeal. *See e.g.* *Estelle v. Dorrough*, 420 U.S. 534 (1975) (involving two-day escape); *United States v. London*, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984) (escape

and recapture during trial disentitled defendant from right to appeal conviction); ***Mason v. Indiana***, 440 N.E.2d 457 (Ind. 1982). The applicability of this doctrine in the civil context, however, remains largely undeveloped and, in the civil rights context, almost non-existent. At the same time, the number of prisoner civil rights suits continues to increase adding to already overcrowded federal dockets throughout the country. As the court which first articulated and applied the fugitive from justice rule in the criminal appeal context, federal courts throughout the country need direction from this Court regarding the applicability of this doctrine to prisoner civil rights actions.

While various federal courts have applied the fugitive from justice rule in civil contexts such as forfeiture or habeas corpus cases, research reveals only two federal circuits that have applied the rule

in the context of prisoner civil rights actions. *See e.g.* ***United States v. $129,374 in U.S. Currency***, 769 F.2d 583 (9th Cir. 1985) (***Molinaro*** disentitlement doctrine used to bar intervention in civil forfeiture proceeding by fugitive's successor in interest); ***Joensen v. Wainwright***, 615 F.2d 1077 (5th Cir. 1980) (dismissing habeas corpus action because criminal defendant previously abandoned his appeal by escaping while appeal was pending). In ***Clark v. James***, 794 F.2d 595 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit dismissed the plaintiff prisoner's Eighth and Fourteenth Amendment claims against prison officials after the plaintiff escaped and was recaptured. In so doing, the court analogized the facts in that case to situations where criminal appeals are dismissed when the criminal escapes during the pendency of his appeal because escape is held to constitute an abandonment of the

appeal. *Id.* at 597. The ***Clark*** court expressly stated that, although the inmate in that case was recaptured prior to dismissal of his case, his action "was properly closed when plaintiff escaped and thereby sacrificed the opportunity to prosecute his claim." *Id.* The court held in ***Clark*** that, by his escape, the inmate forfeited his entitlement to "call upon the resources of the Court for determination of his claims." *Id.*, citing ***Molinaro***.

The United States Court of Appeals for the Third Circuit has also considered the applicability of the fugitive from justice rule in the context of a prisoner civil rights action against prison officials. In ***Ali v. Sims***, 788 F.2d 954 (3rd Cir. 1986), the court dismissed the plaintiff fugitive's § 1983 action because the plaintiff's act of escaping "demonstrated such disrespect for the legal process that he has no right to call upon the court to adjudicate his

claim." The ***Ali*** court went on to state that "in this age of overcrowded dockets and court backlogs, it is unreasonable to expect a court to expend its scarce resources on one who has blatantly disregarded the court's procedures." *Id.* at 959, *citing* ***Molinaro***. *See also* ***Beckett v. Cuyler***, 523 F.Supp. 104 (E.D. Pa. 1981) (granting defendants' motion to dismiss recaptured plaintiff-prisoner's pre-escape claims regarding alleged constitutional violations during incarceration, concluding prisoner had sacrificed his opportunity to prosecute his § 1983 claims when he escaped).

While the ***Clark*** and ***Ali*** opinions reflect the earliest and, prior to the case at hand, only federal appellate court decisions applying the fugitive from justice rule to prisoner civil rights actions, each of these opinions clearly hit on the significant and fundamental basis behind ***Molinaro***, i.e. prisoners who escape

demonstrate such disrespect for the legal process as to disentitle themselves from their right to continue to call upon the judicial resources previously available to them for their own purposes. Other cases applying the ***Molinaro*** disentitlement doctrine in actions such as civil forfeiture proceedings, and certainly the Eighth Circuit in the context of this case, have needlessly complicated the fundamental principles of ***Molinaro*** to such an extent that clarification from this Court would seem the only way to make sense out of confusion. *See* ***United States v. One Parcel of Real Estate***, 868 F.2d 1214 (11th Cir. 1989); ***United States v. Real Property Located at Incline Village***, 755 F.Supp. 308 (D.Nev. 1990).

Amidst the plethora of prisoner civil rights actions and large court backlogs facing federal and state judges throughout this country, it is of the utmost importance

that the integrity of our judicial system be protected to the greatest extent possible. This Court established one way to maintain the high standard of justice in the criminal appeal context when it decided ***Molinaro v. New Jersey*** in 1970. That decision has had a significant impact in the area of criminal appeal litigation and, although one could never calculate the deterrent effect this decision has had on criminal defendants who contemplate escaped but desire to appeal their convictions, the decision has certainly preserved the integrity of our judicial system. It is time to articulate a similarly clear policy for protecting the integrity of our judicial system in the prisoner civil rights context. To squarely address the simple but important issue presented in this case would undoubtedly have a future impact on civil rights litigation in the prisoner context similar to the impact ***Molinaro*** has had in the area of criminal appeals.

This Court's review of this issue is particularly important in light of the confusing, inconsistent and obscure rationale currently being articulated by some federal courts under the auspices of applying the ***Molinaro*** disentitlement doctrine in civil context. The Eighth Circuit's opinion in this case exemplifies the confusion and erroneous rationale which is currently developing in certain federal circuits and warrants clarification from this Court.

B. The Eighth Circuit's Rationale for Reversing the District Court and Refusing to Apply the Fugitive from Justice Rule in this Case has Serious and Detrimental Public Policy Ramifications.

The Eighth Circuit expressly based its analysis and conclusion for reversing the district court in this case on the rationale set forth in *United States* v. *Snow*, 748 F.2d 928 (4th Cir. 1984). In *Snow*, the

Fourth Circuit refused to dismiss a prisoner's appeal from the district court's denial of his motion to vacate his criminal sentence. While the ***Snow*** court affirmed the lower court's denial, it determined that dismissal was not warranted pursuant to the fugitive from justice rule because: "(1) the defendant's escape and recapture did not inconvenience the court's schedule; (2) the defendant's escape lasted only a short period; and (3) dismissing the defendant's appeal would punish defendant twice for the same crime." Appendix B at A13. The September 24, 1991 Order of the Eighth Circuit states that the three reasons listed in ***Snow*** for refusing to dismiss the criminal appeal in that case "apply with equal force to the facts of this case and weigh against dismissing Perko's case." *Id.* at 5-6. The Eighth Circuit's unqualified application of the ***Snow*** rationale to this case has serious and

detrimental ramifications which should be corrected.

The Eighth Circuit suggests that dismissal of this § 1983 lawsuit initiated by Perko in hopes of obtaining money damages only would constitute "punishment" clearly implicating double jeopardy concerns given Perko was criminally convicted of escape. This suggestion contradicts well-established principles of this Court and the law of the Eighth Circuit itself. Research reveals no instance where this Court characterized the dismissal of a plaintiff's civil rights suit against a private party as punishment in the criminal sense. In fact, this Court has held that the Double Jeopardy Clause is not triggered by litigation between private parties, such as Perko and the prison officials and staff in this action. *See* ***United States v. Halper***, 490 U.S. 435 (1989). In concluding that a civil penalty might under some circumstances, constitute

punishment for double jeopardy purposes, this Court in ***Halper*** specifically cautioned that:

> The only proscription established by our ruling is that the **Government** may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

Id. (emphasis added). The Government is not a party to this lawsuit and Perko is not a criminal defendant in this case. Whatever legal basis the Fourth Circuit in ***Snow*** may have had for voicing this concern in an action involving the United States, there is no basis in law for characterizing a dismissal of Perko's § 1983 action as punishment for double jeopardy purposes. Thus, the Eighth Circuit's assertion that all three reasons articulated in ***Snow*** apply with equal force to this case not only

contradicts prior decisions of this Court, but needlessly confuses the principles behind the fugitive from justice rule. *See also* ***Buckley v. Lockhart***, 892 F.2d 715, 720-21, n.5 (8th Cir. 1989) (where the Eighth Circuit itself expressly characterized a prisoner's lost opportunity to file or maintain a criminal appeal as a **consequence** of his escape rather than punishment).

The public policy ramifications of applying the ***Snow*** rationale to the facts in this case are also problematic and detrimental as a matter of precedent. The Eighth Circuit suggests that the short duration of time Perko was out on escape status weighs against the district court's decision to dismiss his case. The parties agree Perko was at large for just two days. However, it is also undisputed that Perko was apprehended against his will following a large man-hunt initiated for his return. The duration of a fugitive's illegal absence is

not dispositive in determining whether to dismiss the fugitive's pending litigation pursuant to the fugitive from justice rule. This Court has previously permitted the post-recapture dismissal of a criminal appeal where the fugitive remained at large just two days and was recaptured involuntarily. ***Estelle v. Dorrough***, 420 U.S. 534 (1975). Any suggestion that the two-day escape period in this case, which ended involuntarily and as a result of extensive efforts of prison and/or law enforcement personnel, is too short a period to permit dismissal pursuant to the fugitive from justice rule is contrary to ***Estelle*** and poor precedent as a matter of public policy.

The Eighth Circuit was not prohibited by legal precedent from affirming the district court's dismissal under the circumstances of this case. In fact, important policy considerations indicate the facts in this case, if anything, should weigh in favor of

dismissal of Perko's claims. It is not to Perko's credit that he remained at large for just two days. Fugitives recaptured involuntarily have "few if any equities to argue." *United States v. Puzzanghera*, 820 F.2d 25, 27 (1st Cir. 1987). Rather, prison officials and law enforcement personnel involved in apprehending Perko in such a timely manner should be applauded for their efforts in protecting the public from a dangerous criminal. Instead, the Eighth Circuit's opinion discourages effective public protection measures by suggesting that Perko's case might warrant dismissal had officials not apprehended him in such a timely fashion.

The egregiousness of Perko's conduct is the same whether he remained at large for two days, six months, or fifteen years. He knowingly and intentionally flouted the judicial system and, in so doing, disentitled himself "to call upon the resources of the

Court for determination of his claims." ***Molinaro***, 396 U.S. at 366. Had his plans not gone awry and/or had public agencies not operated effectively, Perko would undoubtedly still be at large. The short duration of his escape should not weigh in his favor.

The inmate who accompanied Perko on his escape, Neil Schleeper, was later held by the Missouri Court of Appeals to have lost his right to pursue his criminal appeal as a result of his two-day escape. *See* ***State v. Schleeper***, 806 S.W.2d 459 (Mo. App. 1991). Although both inmates were only on escape status for two days, one was deemed to have disentitled himself from his right to pursue his personal freedom, while the Eighth Circuit considered dismissal of Perko's claim for monetary relief in a civil rights action "unfair." Appendix B at A15. The inconsistent results reached by courts with respect to these two inmates who escaped and were recaptured on the same days and under

the same circumstances would seem to send two messages to inmates who might contemplate escape, both of which are clearly in error as a matter of sound policy. The first message inmates might get from a comparison of Schleeper and Perko's cases is that our legal system considers a remote interest in a monetary judgment more valuable than the personal liberty of a man. Equally erroneous is the suggestion that inmates can flout the proceedings of federal courts in civil actions although they will be required to suffer the consequences of similar behavior in state court.

Molinaro, clearly authorized dismissal of Schleeper's criminal appeal as a consequence of his escape. The result in ***Schleeper*** is correct. The district court in the case at bar was equally authorized to conclude in its discretion that Perko's case warranted dismissal under the same circumstances. The district court's decision

in Perko was correct. The error arose when the Eighth Circuit concluded dismissal of Perko's civil rights action was unwarranted and reversed the decision made by the district court.

The Eighth Circuit also indicates in its September 24, 1991 Order that Perko's escape did not warrant dismissal because the federal court was not inconvenienced as a result thereof. Certainly any inconvenience to the court as a result of a fugitive's escape would weigh against that fugitive with respect to applying the fugitive from justice rule to pending litigation. As a matter of sound policy, however, the inverse should not be considered equally true. It is not sound policy to suggest a prisoner should be rewarded by permitting him to continue to prosecute an otherwise abandoned lawsuit so long as he schedules his escape and abandonment so as not to interfere with court dates or deadlines. It is sound policy to

discourage all escapes no matter when they are scheduled and to close the courthouse doors on an inmate who seeks to use the judicial system for monetary gain while simultaneously flaunting his disdain for the law and his unwillingness to abide by adverse judicial decisions.

The Eighth Circuit also expressed concern regarding the separate nature of Perko's civil rights action from the various crimes for which he has been incarcerated. The Eighth Circuit's attempt to impose a nexus requirement in connection with applying the fugitive from justice rule reflects one of the various ways in which federal courts are complicating the otherwise simple principle established in ***Molinaro***. It is important that federal courts regain the central focus behind ***Molinaro*** -- judicial integrity, justice and sound policy. Instead, the Eighth Circuit has lost focus on these principles by adopting a nexus

requirement, the result of which is clearly to the degradation of the federal judicial system and public morale. Even the earlier civil cases which specifically addressed this type of relationship issue were cases where the fugitive from justice was defending rather than prosecuting the cause. *See e.g.* ***United States v. Real Property located at Incline Village***, 755 F.Supp. 308, 311-12 (D. Nev. 1990) (summarizing case law applying ***Molinaro*** disentitlement doctrine in civil forfeiture proceedings and the existence of a nexus requirement in that context). Moreover, this type of relationship issue has never precluded dismissal in civil cases where the fugitive from justice was the plaintiff in the case. *See* ***Ali***, 788 F.2d 954 (constitutional claim regarding conditions of confinement dismissed with prejudice with no mention of fugitive's convictions); ***Clark***, 794 F.2d 595 (Eighth and Fourteenth Amendment claims

against prison officials dismissed after plaintiff's escape and recapture with no mention of plaintiff's crimes); ***Beckett***, 523 F.Supp. at 105-06 (plaintiff's pre-escape § 1983 claims for monetary relief alleging deprivations of constitutional rights while incarcerated dismissed pursuant to fugitive from justice rule although unrelated to plaintiff's conviction of third degree murder).

The rationale behind ***Molinaro*** and important public policies are not served by permitting prisoners who escape from prison to continue to prosecute civil actions which they initiated while in prison prior to their escape simply because those actions have no relationship to the crimes for which they are convicted, while simultaneously prohibiting those same prisoners from defending their property or liberty in cases initiated by others prior to their escape. This case does not present the question of whether or how

the fugitive from justice rule might apply to a claim initiated by a plaintiff in the free world who later becomes incarcerated and then escapes. Rather, the question in this case relates to a prisoner who has called upon judicial resources to sue prison officials regarding prison-related matters at taxpayer expense and with appointed counsel. As a matter of sound policy, district courts should be permitted to decline to extend additional gratuities of our judicial system to plaintiff's such as Perko whose conduct so clearly shuns what most Americans hold dear.

Perko's escape from prison during the pendency of his civil rights action against prison officials was "inconsistent with the pursuit of judicial remedies and constitute[d] a voluntary waiver" of his claim. ***Hussein v. Immigration and Naturalization Service***, 817 F.2d 63, 63 (9th Cir. 1986). The question before the district court in this case was whether to

overlook Perko's waiver or, in essence, re-entitle him to pursue his claim, or whether, based on the facts of this case, applicable law and sound policy, to require Perko to live with the consequences of his abandonment. District courts in this country should not be required to overlook the type of egregious disrespect manifested by Perko for the very legal system through which he hopes to obtain monetary gain. The district court's decision in this case should have been affirmed. Instead, the Eighth Circuit of Appeals reversed that decision and issued an opinion which contradicts the previous law of this Court and raises serious public policy questions which can be effectively addressed and readdressed only by this Court.

CONCLUSION

Petitioners urge this Court to clarify the state of the law regarding the issue presented in this case and respectfully request this Court grant a writ of certiorari.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

BRUCE FARMER
Assistant Attorney General
Missouri Bar No. 31407

JUNE STRIEGEL DOUGHTY
Assistant Attorney General
Missouri Bar No. 38235

P.O. Box 899
Jefferson City, MO 65102
Phone: (314) 751-3321

ATTORNEYS FOR PETITIONERS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2227WMJC

James Perko, Appellant, v. Dr. Bowers, Unknown Medical Personnel, Gerald Wireman, Frederick T. Counterman, Dr. Cowles, Kenneth Watson Appellees.	)	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Appellees' petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is denied.

October 31, 1991

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 90-2227

James Perko,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the
	)	United States Dr.
Bowers, Unknown	)	District Court for
Medical Personnel,	)	the Western
Gerald Wireman,	)	District of
Frederick T.	)	Missouri
Counterman, Dr.	)	
Cowles, Kenneth	)	
Watson,	)	
	)	
Appellees.	)	

Submitted: June 11, 1991

Filed: September 24, 1991

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BEAM, Circuit Judge.

BRIGHT, Senior Circuit Judge.

James Perko appeals the district court's dismissal of his 42 U.S.C. § 1983 action against officials and medical personnel of the Missouri State Penitentiary in Jefferson City, Missouri. The district court granted

defendants' motion for dismissal under the "fugitive from justice rule," which allows a court to dismiss certain judicial proceedings of a prisoner because of his escape, on the basis of Perko's two-day escape from prison. Perko contends on appeal that the district court erred by dismissing his action. We agree and reverse the district court's judgment of dismissal.

I. BACKGROUND

In May 1987, while confined at the Missouri State Penitentiary in Jefferson City, Missouri, Perko brought this § 1983 claim against prison officials and medical personnel, alleging that the defendants showed deliberate indifference to his serious medical needs in their diagnosis and treatment of his tuberculosis. The district court referred the case to a magistrate judge

for processing. While the case was pending, Perko completed his prison sentence and was released from confinement. He actively pursued his claim after his release.

On June 12, 1988, police arrested Perko for armed robbery. Subsequently, he was convicted and sentenced to fifteen years imprisonment in the Missouri prison system. Perko served his new sentence at a different institution than the one at issue in this case. During this second period of incarceration, Perko continued actively to pursue his § 1983 claim.

In June 1989, the district court granted Perko leave to proceed with his § 1983 claims in forma pauperis and appointed counsel to represent him. On September 5, 1989, Perko escaped from confinement, but state officials recaptured him on September 7, 1989.

Perko received an additional three-year sentence for his escape. Upon his return to confinement, Perko continued to press his § 1983 claim, conducting discovery throughout the fall of 1989. The record fails to disclose any interruption in the processing of this case as a result of his escape.

On January 4, 1990, approximately four months after Perko's escape and recapture, defendants filed a motion to dismiss this case on the basis of the fugitive from justice rule. The magistrate judge issued a Report and Recommendation denying defendants' motion to dismiss. Defendants filed exceptions to the Report and Recommendation and requested certification of the decision for interlocutory appeal. Upon certification, and after reviewing the record de novo, the district court

summarily declined to follow the magistrate judge's recommendation and dismissed Perko's claims pursuant to the fugitive from justice rule. The district court ruled, in effect, that Perko's two-day escape from detention during the pendency of this action automatically triggered the fugitive from justice rule requiring dismissal. This appeal followed.

II. DISCUSSION

This case presents the novel question of the applicability of the so-called "fugitive from justice rule" (rule) to cases other than direct criminal appeals. The parties agree to the well-established doctrine that an appellate court may dismiss a convicted defendant's criminal appeal pursuant to the rule if the defendant has become a fugitive from justice during the

pendency of the appeal. See, e.g., Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam); Brinlee v. United States, 483 F.2d 925, 926-27 (8th Cir. 1973) (per curiam). At issue here, however, is whether the rule applies to civil suits brought by criminal defendants and, if so, how the rule should be applied. Perko argues that the rules does not apply in the civil context and that even if it does, the circumstances of his case do not warrant dismissal. In contrast, the defendants argue that the rule operates per se in the civil context.

We have described the fugitive from justice rule as follows: "The general rule is that a criminal defendant who by his escape removes himself from the court's power and process and remains at large during the pendency of his appeal forfeits his right to appeal." Wayne

v. Wyrick, 646 F.2d 1268, 1270 (8th Cir. 1981). Our prior cases deal only with the effect of the rule on criminal appeals, and the Supreme Court has yet to define the reach of the rule outside such cases. The Supreme Court's pronouncements on the rule all involve criminal appeals in which the defendant remained at large at the time of the decision. See Molinaro, 396 U.S. 365; Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876). But cf. Estelle v. Dorrough, 420 U.S. 534 (1975) (per curiam) (upholding Texas statute allowing for dismissal of appeals even when defendant has returned to custody).

Several of our sister circuits, however, have extended the reach of the fugitive from justice rule to apply to habeas cases, e.g., Gonzales v. Stover, 575 F.2d 827, 827-28 (10th Cir.

1978) (per curiam) (§ 2254 petition), civil cases, e.g., Ali v. Sims, 788 F.2d 954 (3rd Cir. 1986) (civil rights case); Doyle v. United States Dep't of Justice, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (per curiam) (Freedom of Information Act case), cert. denied, 455 U.S. 1002 (1982), and cases wherein the defendant was returned to custody at the time of the appeal, e.g., United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1015 (1983).[1]

From our review of the cases, we are persuaded that the fugitive from justice rule may be selectively applied

---

[1]For a comprehensive discussion of the expansion of the fugitive from justice rule, see Grippando, Fear of Flying -- The Fugitive's Fleeting Right to a Federal Appeal, 54 Fordham L. Rev. 661, 662 (1986).

in the civil context. As recognized by our sister circuits, many of the concerns raised by a defendant's escape in the criminal context also arise in the civil context. See, e.g., Ali,, 788 F.2d at 959. For example, the problem that the defendant cannot be made to respond to the power of the court in the event of an adverse judgment, Smith, 94 U.S. at 97; Brinlee, 483 F.2d at 926, and the defendant's apparent lack of respect for the judicial system, Molinaro, 396 U.S. at 366, exist in the civil context as well.

However, the rule will not be applied in a per se manner: a court should exercise its discretion in determining whether to dismiss a criminal defendant's civil case based upon the circumstances of each individual case. See, e.g., United

States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (court "decided to exercise its discretion in favor of permitting the appeal to proceed").

In reaching its decision in this case, the district court appears to have applied the rule in a per se manner. While ordinarily we would reverse and remand the case to the district court with instructions to redetermine the issue in accordance with our opinion, the undisputed facts of this case justify our resolving the issue. We conclude that the circumstances of Perko's case do not warrant the harsh sanction of dismissal.

As noted by the First Circuit, "the sanction of dismissal should not lightly be invoked." United States v. Gordon, 538 F.2d 914, 915 (1st Cir. 1976), cert. denied, 441 U.S. 936 (1979). In this case, several factors mitigate

against the application of the fugitive from justice rule. First, Perko's escape lasted less than three days and caused no disruption to the proceedings of this case. Perko did not miss any court dates or filing deadlines. As recognized by the Fourth Circuit, the dismissal of a criminal defendant's appeal is not automatic after the defendant has been returned to custody. Snow, 748 F.2d at 930.

In Snow, the defendant escaped while his appeal was pending, but was back in custody by the time the government sought dismissal. The court in Snow refused to dismiss the appeal, identifying three reasons supporting its decision: 1) the defendant's escape and recapture did not inconvenience the court's schedule; 2) the defendant's escape lasted only a short period; and 3) dismissing the defendant's appeal

would punish defendant twice for the same crime. Id. at 930 & n.3. All three reasons apply with equal force to the facts of this case and weigh against dismissing Perko's case.

Second, Perko's civil claim is completely distinct and separate from the sentence he was serving at the time of his escape and the underlying conviction. Cf. United Stats v. One Parcel of Real Estate, 868 F.2d 1214, 1216 (11th Cir. 1989) (recognizing propriety of applying rule to civil action because it related to underlying criminal conviction from which the defendant fled). Perko escaped while incarcerated under a different sentence for a different crime than that which gave rise to his civil rights action. Perko's claim rests upon the defendant's alleged deliberate indifference to his medical needs during his previous

incarceration at a different Missouri prison from whence Perko escaped.

Finally, the defendants waited approximately four months after Perko's escape and recapture before moving the court to dismiss the case. During that period, both parties engaged in discovery and prepared for trial. In light of the defendants' delay, it would be unfair to Perko now to dismiss his action.

III. CONCLUSION

Accordingly, the district court's judgment is reversed and the case is remanded with directions to reinstate and promptly process this case which has been pending since 1987.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

JAMES PERKO,	)	
	)	
Plaintiff,	)	
	)	No. 87-4229-CV-C-5
v.	)	
	)	
DR. BOWERS, et al.,	)	
	)	
Defendants.	)	

ORDER

By report of May 2, 1990, the United States Magistrate to whom this cause has been referred recommended that defendants' motion of January 4, 1990, to dismiss be denied. The parties were advised they could file written exceptions to the recommendation, pursuant to 28 U.S.C. Sec. 636(b)(1)(C).

A de novo review of the record in this cause, including the well-reasoned exceptions filed by defendants on May 22, 1990, convinces the court that the recommendation of the Magistrate should

not be adopted. For the reasons set forth in defendants' motion and exceptions, it is hereby

ORDERED that defendants' motion of January 4, 1990, to dismiss plaintiff's claims in the above-styled cause is granted and this case is dismissed.

SCOTT O. WRIGHT
U.S. District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

JAMES PERKO,	)	
	)	
Plaintiff,	)	
	)	No. 87-4229-CV-C-5
v.	)	
	)	
DR. BOWERS, et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Plaintiff, an inmate confined in a Missouri penal institution commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343. Following the filing of this cause, it was referred to the undersigned United States Magistrate for processing in accordance with the Magistrate Act, 28 U.S.C. § 636, and W.D.Mo.R. 22.

On January 4, 1990, defendants filed a motion to dismiss plaintiff's

claims in the above-styled cause because plaintiff abandoned his claims when he escaped from custody. Plaintiff, through counsel, responded thereto on January 16, 1990, and states he has not abandoned his claims and has taken numerous steps to prosecute this cause.

Defendants' motion is well taken and dismissal of a plaintiff's legal claims because plaintiff escaped can be justified and is supported by the holdings and dictum in the cited cases. Those cases, however, are from other circuits and this court has not been able to find any cases from this circuit supporting defendants' position. Further, the circumstances in the cited cases are somewhat different from those in this case because plaintiff's counsel has been diligent in prosecuting plaintiff's claims and plaintiff was on escape status for a relatively short

time. However, this court is convinced that had plaintiff not been apprehended, he would never have pursued this case.

Plaintiff is advised, however, that should a subsequent escape occur, plaintiff's claims in this and any other pending civil rights case may be subject to dismissal for abandonment and failure to prosecute or comply with court orders. It is being allowed to continue only because of the serious nature of the allegations in the complaint.

For the forestated reasons and pursuant to the provision of 28 U.S.C. § 636, it is

RECOMMENDED that defendants' motion of January 4, 1990, to dismiss be denied.

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to any or all of the foregoing recommendations within twenty (20) days of their receipt thereof. If

additional time is needed to file exceptions, a motion requesting such time should be filed within said twenty days, giving the reasons for the request. See Nettles v. Wainwright, 656 F.2d 986 (5th Cir. 1981); Messimer v. Lockhart, 702 F.2d 729 (8th Cir. 1983); Thomas v. Arn, 474 U.S. 140 (1985); Nash v. Black, 781 F.2d 665 (8th Cir. 1986). The parties are advised that failure to make specific written exceptions to this Report and Recommendation may result in a waiver of their right to appeal.

Dated this 2nd day of May, 1990.

WILLIAM A. KNOX
U.S. Magistrate